UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **LISA ANN DUMONTIER**, Debtor.	Case No. **05-60598-13**

MEMORANDUM OF DECISION

At Butte in said District this 20th day of September, 2005.

Pending in this Chapter 13 case are: (1) Debtor's objection to her former spouse Mike McVicker's ("McVicker") Proof of Claim No. 11 and (2) Debtor's motion for valuation of McVicker's security at $0.00, both filed May 26, 2005; (3) McVicker's motion to dismiss this case with prejudice for bad faith, filed April 20, 2005; and (4) confirmation of Debtor's amended Chapter 13 Plan and objections thereto filed by McVicker and the Chapter 13 Trustee. Hearing on these matters was held after due notice at Missoula on July 7, 2005. The Debtor Lisa Ann Dumontier (hereinafter "Lisa" or "Debtor") appeared and testified, represented by attorney Daniel S. Morgan ("Morgan"). McVicker appeared and testified, represented by attorney Harold V. Dye ("Dye"). Debtor's father Leroy Dumontier ("Leroy") testified. By stipulation of counsel exhibits ("Ex.") A, B[1], 1, 2, 3, 4, 5, 6, 7, 8, and 9 were admitted into evidence without objection. The Court took judicial notice of Debtor's amended schedules.

[1]Ex. B is McVicker's deposition dated June 21, 2005, and Ex. B includes five (5) numbered deposition exhibits, including Debtor's amended Schedules and other exhibits.

After the conclusion of the parties' cases-in-chief the Court closed the record[2] and granted the parties time to file simultaneous briefs, which have been submitted and reviewed by the Court, together with the record and applicable law. These matters are ready for decision[3]. This Court has jurisdiction of this case under 28 U.S.C. § 1334(a). The pending matters are core proceedings under 28 U.S.C. § 157(b)(2). This Memorandum of Decision includes the Court's findings of fact and conclusions of law.

FACTS

The Debtor Lisa Dumontier is Leroy's daughter and McVicker's former spouse. She is a licensed realtor, employed for the last 3 years at Mission Valley Properties in St. Ignatius, Montana. She testified she first was licensed as a real estate agent in 1996, then was inactive for several years until she started selling real estate in March 2002.

Lisa has four daughters – two girls ages 13 and 10 from her first marriage to Bryan Bolin, which ended in divorce, and two girls ages 5 and 2 from her marriage to McVicker whom she married in 1998. Her marriage to McVicker ended in divorce in 2004. Lisa and McVicker share joint custody with their two youngest daughters, and McVicker adopted Lisa's two older daughters in 2002. All four daughters live with Lisa in a house on Indian trust land leased from Leroy.

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[2]On August 24, 2005, Debtor filed a Status Report stating that she is surrendering her 2002 Mercedes coupe as demanded by the Trustee and McVicker. No response to Debtor's Status Report has been filed by the Trustee or McVicker, nor have they had an opportunity to examine the Debtor under oath on the alleged surrender.

[3]Since the Debtor's alleged surrender of the Mercedes necessarily affects her disposable income available for plan payments, confirmation of Debtor's pending Plan will be denied and the Court will reset the plan confirmation hearing in order that the parties may have the opportunity to examine the Debtor under oath on the Mercedes and other changes.

Leroy controls 80 acres of Indian trust land situated next to his residence in Lake County, Montana. He testified that he is an enrolled member[4] of the Salish-Kootenai tribe and has a sole ownership and right to live on the 80 acre property since 1956, which is evidenced by an ownership statement held in trust by the United States government and subject to restrictions**.** Lisa is a Line 1 descendant of the tribe, but is not an enrolled member.

In 1999, Leroy gave Lisa a homesite lease on two and one-half acres[5] on the 80 acres, for a total rent of $1 for a term of 25 years, with a possible renewal for another 25 years if the parties agree. The homesite lease was admitted into evidence as Ex. 8[6]. Leroy testified that he intended in Ex. 8 to give Lisa a place to live with his granddaughters that could not be transferred, sold or liened, although Leroy stated he retained the right to place liens on the 80 acres by recordation in tribal records. He testified that among the advantages to building a home on tribal land are that the owner does not have to pay state property taxes to Montana or obtain permits from state government[7], and that state court judgments "absolutely" do not attach to Indian trust land. Lisa testified that, as a realtor in Lake County, she has never seen state court judgment liens recorded on Indian trust land.

Ex. 8's provisions for the homesite lease, made in accordance with the United Stated

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[4]Leroy's spouse is not an enrolled tribal member, but has a life estate on his property.

[5]Lisa clarified that her leased premises is only on two and one-half of Leroy's 80 acres.

[6]The homesite lease is also attached to Ex. B marked as exhibit 3.

[7]Leroy asserted that state government has no jurisdiction over Indian trust land, and he related an incident where a state plumbing inspector who came to his property left and did not return after being told the property was Indian trust land.

Department of Interior Bureau of Indian Affairs ("BIA") laws and regulations[8], include but are not limited to:

> IMPROVEMENTS. Unless otherwise provided it is understood and agree that any buildings or other improvements placed upon the said land by the Lessee become the property of the Lessor upon termination or expiration of this lease. Any improvements, other then [sic] ones for residential purposes, to be constructed on the land must be approved by the Lessor prior to their construction. Improvements for residential purposes must be of a design and structure comparable to others in the same block or area. Prior to making any improvements the Lessee shall present an Improvement Plan to the Lessor of any proposed changes and improvements Lessee intends to make to the leased premises. It is understood and agreed by Lessee that no improvements will be added to the leased premises without prior written Lessor approval.

Ex. 8 by its terms is binding on all heirs and assigns to the parties to the lease. In addition, Ex. 8 provides that the parties to the lease agree that jurisdiction over any dispute or controversy arising from the lease or the Lessee's use of the leased premises "shall rest with the Tribal Court of the Confederated Salish and Kootenai Tribes". Ex. 8, p. 2. Additional provisions agreed to by Leroy and Lisa are on page 3, and include the following:

> 19. Any improvements, other then [sic] ones for residential purposes, to be constructed on the land must be approved by the Lessor prior to their construction. Improvements for residential purposes must be of a design and structure comparable to others in the same block or area.
>
> 20. Mutual Cancellation Clause. This lease may only be canceled by consent of the Lessor and the Lessee. Request for cancellation must be submitted in writing 60 days prior to the requested cancellation date.
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> 21. The Lessee reserves the right to remove any and all buildings erected as his/her expense on the above described land within thirty (30) days after expiration of lease or termination thereof. Structures not removed within the time specified shall become the property of the Lessor.

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[8]Ex. 3 cites and incorporates 25 CFR § 162. Non-Agricultural leases are covered at Subpart F, § 162.600 *et seq.*

> 22. Except as provided herein, the Lessee shall not, during the base term or any renewal period, mortgage or in any way encumber this lease or its interest therein as security or collateral to guarantee any debt now or hereafter incurred by it or without the prior express written approval fo the Lessor and or the Secretary.

Leroy testified that paragraph 22 of the homesite lease was intended to prevent Lisa from selling, mortgaging, or given a lien on the 80 acres. Leroy testified that Lake County Montana records have nothing to do with his Indian trust land, that he has never seen a state court lien attach to Indian Trust Land, and that it would take an act of Congress to attach a lien on Indian Trust Land.

Leroy and Lisa signed Ex. 8, the homesite lease, on September 15, 1999. It was approved by the Superintendent of the Flathead Agency on September 22, 1999, and recorded on September 23, 1999, in the Titles & Records Section, Branch of Realty of the Confederated Salish Kootenai Tribes. Ex. 8.

Lisa testified that McVicker wanted to live on Leroy's Indian trust land for the fishing opportunities and to keep horses. She explained that in her first divorce her house was sold and she split the proceeds with her first husband. She then purchased McVicker's house from him with $165,000 of her first divorce settlement in 1998, leaving her with a net of $97,000 in 1998.

Leroy testified that Lisa and McVicker needed his permission to build a house on his Indian trust land, and that he gave permission in order that his grandkids would have a home. Lisa and McVicker built a 2,500 square foot wood frame house on the leased premises, beginning in October of 1999 and completing most construction in 2000. Leroy testified that the funds used for constructing the home came from the sale by Lisa and her first husband of a house in the Bitterroot Valley. Lisa testified that the Arlee house is still not finished with respect to

rock work, the fireplace, siding, and inside trim and doors, and that there are problems with the deck.

As noted above, Leroy testified that anyone wanting to remove the house from his Indian trust land would need his permission, which he does not intend to give, and that he does not want anyone other than Lisa and her family to have access on the property. Lisa testified that Ex. 8 allows removal of improvements only with Leroy's permission. Leroy testified that he told McVicker that McVicker would never have any claim of ownership over Lisa's home on Leroy's Indian trust land, based both upon Leroy's intent and federal law governing Indian trust land. In his deposition, Ex. B, page 25, regarding construction of the home on Leroy's land McVicker testified: "No, I wasn't really involved in it. She had conversations with him." Later McVicker admitted: "Well, we spoke. It was – it wasn't supposed to be my house. It was supposed to be her house. Her money, her house." Ex. B, p. 25. Lisa testified that McVicker knew he would not have an ownership interest in the Arlee house on Leroy's Indian trust land. She testified that McVicker asked Leroy about other construction and ownership of the Arlee house, and that Leroy stated several times he would not allow any other construction on the property.

Lisa testified that all her money from the sale of the Bitterroot home from her first marriage went into building the house on Leroy's Indian trust land at Arlee, and that McVicker contributed labor into the construction, working on the house for about three and a half months. McVicker testified that both he and Lisa contributed to construction of the house, that he contributed money[9] as well as labor, and they borrowed about $33,000 to complete the house.

[9]McVicker's deposition, Ex. B, pp. 20-21, describes the source of his funds as some stocks he sold and some money from his mother's estate, totaling approximately $100,000 of his money.

They made interest-only payments on the $33,000 construction loan from joint funds. McVicker testified that he never paid off the $33,000 principal, and did not know if the loan was paid off. They moved into the Arlee house in January or February of 2000, although it remains unfinished. Lisa testified that the Arlee house is the only home her 2 youngest daughters have ever known.

Lisa and McVicker separated in 2003, a year in which Lisa testified she earned gross commissions of approximately $60,000[10], and commenced divorce proceedings. Lisa testified that she was helped in her real estate business by a person she met who had connections with the Salish-Kootenai tribe, who gave her listings which generated more than 50% of Lisa's commissions.

In her employment as a realtor Lisa often shows high-end real property. She testified that her high-end customers have certain image expectations, and that she needs reliable transportation with 4-wheel drive capability in order to transport buyers to show remote properties. She testified she puts between 48,000 to 50,000 miles per year on her vehicles for work. In 2003, during her divorce proceedings, Lisa leased a Hummer to use for work at a monthly lease payment of $785. The Hummer lease allowed her 80,000 miles over 2 years, and she testified that after the first year she had already run up 48,000. She tried to get out of the Hummer lease, and ended up trading it in September of 2004 in exchange for which Lisa purchased a 2004 Chevrolet Avalanche jointly with her mother, Virginia. Lisa testified that her monthly payment dropped by $100, and that most of the payments on the Avalanche are paid by Virginia who also drives it.

Lisa testified that she contacted A-Able Moving & Rigging, Inc. ("A-Abel") during the

[10]The Statement of Financial Affairs shows her 2003 income as $57,572.00.

divorce about removing the Arlee house from Leroy's Indian trust land, although she admitted that it made no sense because she has no right to remove the improvements from Leroy's land without his permission. McVicker testified that the Arlee house was a contentious issue in their divorce, and that they obtained the A-Abel bid and an replacement cost estimate by Duane E. Smith ("Smith") dated July 15, 2004, Ex. 5, in order to estimate the value of the Arlee house. Lisa testified that McVicker wanted to sell the house and take his half share rather than live in it in another location. Lisa explained that Ex. 6 is A-Abel's proposal to remove the Arlee house, dated June 29, 2004, and it provides that A-Abel would pay them a total of $81,000 for the Arlee house, payable upon removal. Ex. 6 provides that A-Abel will furnish all materials and perform all labor necessary for the completion of:

> the purchase and removal of a 2500 sq ft wood frame house located on a home site lease on tribal truss [sic] property belonging to Leroy DuMontier. This offor [sic] doesn't include removal of the old foundation and doesn't include any reclaimation [sic] to land after home removal. This home is located on leased home site but seller/Lessee Lissa [sic] McVicker has assured mover that her father/Lessor Leroy Dumontier will allow us to cross his property to remove the home from its current location.

Lisa testified that the above passage from Ex. 6 reciting her assurance that Leroy would allow A-Abel to cross his property is untrue. On cross examination she testified that she has never asked Leroy for permission to remove the Arlee house from the leased premises because she knows Leroy would never give access or permission to remove the house because of his desire to maintain a home for his grandchildren, and that if she asked Leroy he would get upset. Lisa testified that she knows she does not have the right to sell the Arlee house. On redirect examination Lisa further testified that the author of Ex. 6 admits he would need Leroy's permission to remove the house, and that A-Abel is located on the reservation and familiar with

tribal trust land and restrictions.

On July 5, 2004, Lisa obtained from appraiser Smith a replacement cost bid, Ex. 5, to estimate the replacement cost of the Arlee house. The total replacement cost estimate after deductions for the Arlee house on Ex. 5 is $269,425.60. Lisa testified that she obtained Ex. 5 because the appraisal done in their divorce was poorly done with a resulting inflated value, and she wanted to know the replacement cost. When pressed on cross examination by Dye about the value of the leased premises, Lisa testified that the two and one-half acres of leased land has a value of between $25,000 to $30,000, and the house has a value of between $275,000 to $280,000, but she repeated that access is a problem because of her father's ability to deny access.

Lisa's and McVicker's divorce, Cause No. DR-03-98 in the Montana Fourth Judicial District Court, Missoula County, became final in 2004. Ex. 1 is the "Marital and Property Settlement Agreement" ("PSA") signed by Lisa and McVicker on October 13, 2004. There is no evidence in the record that Ex. 1 or a judgment and final decree of dissolution in DR-03-98 was ever recorded in Lake County, Montana[11]. Lisa testified that she did not know where the judgment and final decree was recorded.

In Ex. 1 the parties agreed to distribute the marital home located at 548 Dumontier Road, Arlee, Montana, on Leroy's Indian trust land, to Lisa, along with other property. Ex. 3, p. 4. McVicker was awarded a house and real property in Missoula and another house and real property located in Dixon, Montana. In addition, Lisa was ordered to pay McVicker a minimum

[11]The Court notes that deposition Ex. 1 to Ex. B, McVicker's deposition, is a court document entitled "Preliminary Disclosure" of Lisa's assets and liabilities, dated November 13, 2003, and notarized in Lake County, Montana, in Case No. DR-03-98. But the PSA dated October 13, 2004, is under the caption of the Montana Fourth Judicial District Court, Missoula County. There is no explanation in the record for this discrepancy.

of $80,000 cash within 60 days, or had three options to pay increased amounts over time at a minimum of $12,500 per year. Ex. 1, pp. 6-7. Lisa testified that she and McVicker agreed, in order to preserve her house for her kids, that she would obtain a life insurance policy with McVicker named as beneficiary. Such a provision is included in the PSA, Ex. 1 p. 7, in an amount not less than the amount due and owing by Lisa to McVicker. McVicker testified that the money Lisa agreed to pay him in the PSA was in exchange for the value of the Arlee house distributed to her in the PSA.

Lisa testified that in the Spring of 2004 she earned a $50,000 commission which she used to pay off marital debt until it ran out that summer. Her business contact with the tribe transferred in 2004. Lisa testified she earned $82,000 in total commissions in 2004, but her earnings dropped when she lost her tribal contact. Her mother Virginia and her friends helped Lisa pay her attorney $12,000 in attorney's fees for her divorce. Lisa testified that her parents paid McVicker the $15,000 owed for the first year required by Ex. 1 pp. 5-6, leaving $85,000, owing at $12,500 per year.

While married to McVicker, Lisa testified she lived on a household budget of about $4,000, but after the separation and divorce McVicker left and does not help with her living expenses, so Lisa had to cut back on spending. She testified that McVicker does not yet pay any child support or contribute for his children's clothes or school expenses, even though he received $500,000 after his mother's death and stands to inherit more from his grandmother, and that her oldest daughter pays for her own clothes and entertainment from her 4-H income.

Lisa testified that she began contemplating bankruptcy after the beginning of 2005, when she was falling further behind on her bills and was not receiving child support from McVicker

and was depending on her parents' financial help. Lisa filed a Chapter 13 bankruptcy petition on March 14, 2005, with her Schedules and Statement of Financial Affairs listing no real property, and $80,694.00 in other assets including a 2004 Chevrolet Avalanche ("Avalanche") jointly owned with her mother valued at $40,000; a 2002 Mercedes 320 SLK valued at $30,000 and a 2002 ZZN Waverunner valued at $4,000 with a trailer. Lisa testified that she did not list her house on Leroy's Indian trust land on Schedule A because it is worth nothing to her.

Schedule C lists exemptions including a $2,500 motor vehicle exemption in the Mercedes. Schedule D lists secured claims, including claims of GE Capital Financial, Inc. ("GE Capital") secured by the Waverunner; an undersecured claim of GMAC secured by the Avalanche; and WFS Financial, Inc. ("WFS") secured by the Mercedes. McVicker is listed on Schedule F as an unsecured creditor with a claim in the sum of $85,000, of a total of $120,805.95 in general unsecured claims. Schedule I lists Debtor's monthly income as $6,000 as a realtor. Schedule J lists monthly expenses for Lisa and her four daughters of $5,886.13, including a $559 monthly installment payment on an auto, and $2,500 in monthly business expenses which are not itemized, leaving excess income for plan payments of $113.87.

The Statement of Financial Affairs lists Debtor's 2005 income from self employment as $0.00; $112,741.00 in 2004; and $57,572.00 in 2003. Debtor's payments to creditors in the 90 days preceding the petition date include monthly payments to GMAC of $675.00 for the Avalanche; $559.00 to WFS for the Mercedes; a $33,000 payment made by Lisa's parents to First National Bank of Montana on 2/05; and a $15,000 payment to McVicker on 11/4/04.

Debtor filed her first Chapter 13 Plan on March 29, 2005, proposing monthly payments of $115.00 for 36 months. The Plan states that the co-obligor shall make all further payments to

impaired secured claims of GE Capital and GMAC on the Waverunner and Avalanche, and no further payments on those claims will be made by the Debtor, but she will continue to make payments to the unimpaired secured claim of WFS on the Mercedes. The liquidation analysis states that at least $2,000.00 will be distributed to unsecured claims.

The 11 U.S.C. § 341(a) meeting of creditors was held on April 6, 2005. The Trustee questioned the Debtor about several items for which she claimed depreciation on her tax returns but were not listed on her Schedule B, as well as other artwork and jewelry. Lisa testified that she agreed to amend her Schedules to include the omitted property, which she claimed were not originally listed due to oversight.

The Trustee filed objections to confirmation on several grounds, including that the Plan has not been filed in good faith based on Debtor's $120,805.95 in unsecured claims and 2.4% proposed dividend; her payment of $559 per month for a luxury vehicle (the Mercedes) and insurance and her payments of $675 on the Avalanche up to the petition date; her monthly expenses for home maintenance ($100), clothing ($250), transportation ($300) and recreation ($175); Debtor's retention of the Waverunner which the Trustee claims is a luxury item; Debtor's failure to detail $2,500 in monthly business expenditures on Schedule J and failure to turn over bank statements for March 2005; and for understating her projected business income.

Both the Trustee and McVicker filed motions to dismiss[12]. McVicker moved to dismiss with prejudice on April 21, 2005, alleging the Debtor filed her petition in bad faith to defeat the state court property settlement agreement, misrepresented facts and falsely and fraudulently omitted from her Schedules the home valued at more than $350,000, a 1.5 carat diamond and

[12]The Trustee withdrew his motion to dismiss on May 24, 2005.

other jewelry, and other assets and transfers, fraudulently overstated her business expenses and understated her income, and is manipulating the bankruptcy system by falsely testifying that the Avalanche and Waverunner are for Debtor's mother and that Debtor is keeping disposable income from the Trustee. McVicker also objected to confirmation of Debtor's Plan on the same grounds as his motion to dismiss and the Trustee's objection, and in addition based on the "best interests of creditors" test, 11 U.S.C. § 1325(a)(4).

McVicker filed Proof of Claim No. 11 on May 24, 2005, asserting a secured claim in the amount of $87,786.70, with the security described as the attached PSA from the parties' divorce in Cause No. DR-03-98 valued by McVicker at $269,425.60, but not secured by real estate or other collateral. Debtor filed an objection to McVicker's claim and motion for valuation of security on May 26, 2005, contending that McVicker's judgment lien cannot attach to Leroy's Indian trust land leased to the Debtor, or in the alternative that the lease of tribal trust land with improvements should be valued at $0.00. McVicker filed responses contending that the value of Debtor's real property is at least $269,425.80, and that real property includes leasehold interest in land and a cabin affixed to land. McVicker admits that he makes no claim that his judgment lien attaches to Debtor's father's interest, and he alleges that the lease allows the removal of any improvements.

Debtor filed an amended Plan on May 23, 2005, and amended her Schedules to list additional assets, clarify business income and expenses and reflect alternate sources of income. Debtor added her leased homesite to Schedule A at a current market value of $0. Schedule B was amended to increase personal property from $80,694 to $87,004.38. Ex. B (Ex. 5 attached thereto). Schedule I was amended to show reduced monthly income of $5,500 on commissions

of $4,000, which Lisa testified was based on her actual earnings, plus $1,200 assistance from her parents.

Schedule J was amended to show reduced monthly expenses of $5,279.63, including $2,627.50 in business expenses of which $1,000.00 is monthly car and truck expenses for the Mercedes and Avalanche. The amended Statement of Financial Affairs lists Lisa's 2004 income as $82,639. She testified that the $112,741 originally listed on her Statement as her 2004 income was in error because it did not reflect the broker's share taken out of her commissions.

Lisa addressed the Trustee's objection to various expenses in her direct testimony. Her amended Schedule J lists car insurance of $321.91 for her Avalanche and Mercedes, which she testified is so high because she has a couple of traffic tickets and because of her occupation, because her employer requires an increased amount of liability coverage, and she cannot transport clients in her vehicle without insurance, which covers both the Avalanche and the Mercedes. She testified that she leased the Mercedes because she wanted a vehicle with better gas mileage to reduce her expenses, especially since her commute to her job is 15 miles each way and she frequently takes long trips. The monthly payment for her Mercedes, which she has since allegedly surrendered, was $560, and Lisa testified she drove the Mercedes most often for work because it got much better gas mileage than the Avalanche. She testified she needs the Avalanche because of its 4 wheel drive and ability to haul more people to show property[13]. Lisa admitted that her Mercedes was a "sore spot" for McVicker. She testified that he told her that if he got rid of the Mercedes he would drop his objections to confirmation. McVicker denied that

[13]The Mercedes is a 2-seater, and Lisa testified that she usually does not drive clients around in the Mercedes.

in his testimony, but on cross examination testified that he would have "some sympathy" if Lisa got rid of 1 vehicle, the Mercedes. McVicker opined that the money Lisa's mother is paying for the Avalanche could be paid for other things. Prior to the filing of her petition, Lisa testified that her mother gave her the money for the Avalanche payment. Virginia is co-liable on the Avalanche note and also drives the Avalanche, but lets Lisa use it when she needs it to show property.

Monthly clothing expenses on Schedule F were reduced from $250.00 to $100; recreation was reduced from $175 to $75; and the auto installment payment was deleted from personal and added to business expenses. Lisa testified that her expenses for home maintenance ($100), clothing, transportation ($300), and recreation ($75) are low for a family with four daughters who live out in the country and must commute. Lisa testified that if she does not earn her $4,000 commissions per month she does not spend the projected amounts of money on recreation, clothing or business cleaning[14]. She testified that her $300 personal transportation expense is her best estimate and separate from her projected business transportation expense of $1,000. She admitted that she probably does not spend $100 per month on home maintenance, but that large home bills are incurred from time to time which justifies that monthly estimate.

The Waverunner is listed on Schedule B with a value of $4,000 and a trailer for it is valued at $500. Lisa testified that her mother Virginia is on the loan for the Waverunner and makes the payments, without reimbursement from Lisa, but allows Lisa to use it[15]. No secured

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[14]Lisa testified that she spent $600 last year on cleaning, but is not spending money on cleaning because her commissions are coming in below projections.

[15]Lisa claimed approximately $6,300 in depreciation for the Waverunner on her tax returns.

claim has been filed or allowed with the Waverunner as security, but GE Capital is listed on Schedule D as a creditor with a claim of $3,962.00 secured by the Waverunner. Lisa testified that she does not use the Waverunner for recreation. She asserted she "hates the water". Rather, she uses the Waverunner in her work to look at and photograph lakefront properties to show prospective buyers. On cross examination by the Trustee Lisa testified that she has used the Waverunner once for business since the filing of her petition.

Lisa amended Schedule B to add several items, including a Dave Samuelson artwork print valued at $1,300, a coyote coat valued at $300, purses valued at $120, and $1,082 additional jewelry over the original $30 scheduled consisting of newly disclosed earrings, necklaces, rings watches and bracelets. Lisa testified that she did not list the $1,300 print because of an oversight. She stated that McVicker previously had broken in to her house and taken it, before returning it in the summer of 2004, and that she hid the print in her attic ever since.

Various office furniture, a printer and a fax machine were added to the amended Schedule B with a total additional value of $1,015, all of which is claimed as exempt on amended Schedule C. Lisa testified she could not remember why she did not list the business equipment originally, but she knew after the § 341 meeting she had to amend her Schedules to add computers and office furniture. She testified that she has a separate office for her real estate business in her house, and that her employee furnishes only a phone, photocopier and paper and she has to provide her own computer, printer, signs, advertising, envelopes and postage. Lisa testified that she is in the process of moving her entire office to Arlee and will have to furnish an entire office, which is why she claimed $7,039 in supplies as a business expense on her 2004 federal tax return, Ex. 3.

The amended Statement of Financial Affairs lists property held for other persons at paragraph 14. Lisa testified that she has six ruby rings with an estimated market value of $800 in storage, all of which she gifted to her daughters more than two years ago[16]. She testified further of two other Black Hills gold rings given to her daughters, a set of diamond earrings given to a daughter, and a diamond purchased by her first husband which was given to her oldest daughter. Another diamond given to Lisa by McVicker after their marriage was set into a ring she wore. After their separation, Lisa testified, she gave it to McVicker as security while she borrowed his computer. After she returned his computer, she testified, McVicker failed to return the diamond, which is destined for her daughter Taylor. Other gifts Lisa testified were given to her daughters include a 4-wheeler given as a Christmas gift to them in 2003[17], and a cookstove promised as a wedding gift for the first daughter who marries. A 243 rifle of Lisa's was given to her daughter Taylor when she started hunting. When asked on cross examination about the above gifts to her daughters, Lisa testified that she wrote out a list of the above-described gifts, and that the six ruby rings are locked in a box in her house but that her daughters, who are still minors, know where the key is and have access to it.

Lisa testified that the foregoing assets were not included in her original Schedules and Statements due to oversight, as they were in storage and/or in the attic. Lisa admitted that she hid some items from McVicker because he broke into her house and stole items, but that she

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[16]The property held for other persons is itemized at McVicker's deposition Ex. B, attached Exhibit 5 (Amended Schedules & Statement of Financial Affairs, Exhibit 2 ("Items held by Lisa Dumontier for other people:")).

[17]Ex. 2 to Ex. 5 attached to Ex. B states the Suzuki ATV was gifted to Lisa's & Bolin's daughters Taylor & Karleigh in Spring 2003, but Lisa testified that date was a typo and that they purchased the ATV at Christmas.

amended her Schedules and Statements because she recognized they needed to be amended to include the omitted items and address the tax questions raised by the Chapter 13 Trustee at the § 341(a) meeting of creditors.

Debtor's Amended Plan provides for 36 months of plan payments in the amount of $230, plus 10% of any real estate commission she earns during the term of the Plan. The liquidation analysis states that at least $5,000 will be distributed to unsecured claims under the Amended Plan, and that Debtor expects another $15,000 to be paid from her real estate commissions, although she has no ability to guarantee that amount "due to their speculative nature." Lisa testified that she is already paying the Trustee ahead of the plan payments.

The claims register summary lists $173,957.90 in total claims filed, with $27,441.65 in unsecured claims, $6,153.00 in priority claims filed by the Montana Department of Revenue ("DOR") and Internal Revenue Service ("IRS"), and $140,363.25 in secured claims including McVicker's and GMAC's claim secured by Debtor's Avalanche. If McVicker's secured claim is disallowed, Lisa testified, the dividend paid to unsecured creditors will be about 16 percent (16%).

Lisa testified that her gross earnings for the first nine months of 2005 have totaled $6,000. She admits that her 2005 income has not been good, and that her commissions in the last year and a half have totaled less than $20,000. She explained that she lost momentum when she lost her connection with the Salish-Kootenai tribe which gave her access to high-end listings, and was not familiar with the regular real estate market and was burdened with stress from her divorce and other sources. She made a $1,000 commission in mid-June, and estimated that another $7,200 in commissions are coming up. She testified that she took on a second job at Zimorino's

restaurant in Arlee, but quit 2 weeks before the hearing because McVicker threatened her about reporting on her parenting evaluation that she was spending too much time away from their children.

Lisa testified that her mother Virginia helps her make ends meet. Ex. A is Virginia's affidavit stating that Virginia and Leroy agree to give Lisa financial assistance of at least $1,200 in any month during which Lisa's real estate commissions do not allow her to make her monthly financial obligations to the Court or to any other creditor for her necessary business and family obligations during her bankruptcy. Lisa testified that McVicker does not pay alimony or any child support.

The Debtor's Status Report filed on August 24, 2005, by Morgan states that the Debtor is surrendering her Mercedes and seeks to further amend her Plan, and that she has paid the Trustee plan payments and $700.80 in additional money from her commissions[18].

DISCUSSION

1. Contentions of the Parties.

The Chapter 13 Trustee stated at hearing that three of his objections to confirmation were cured by Debtor's amended Schedules and Plan, but he continues his disposable income and good faith objections to confirmation.

The Debtor contends that she overcame the prima facie validity of McVicker's Proof of Claim and shifted the burden of proof to McVicker to show that he has a valid secured claim

[18]Morgan's Status Report is not evidence. *In re Nielsen*, 211 B.R. 19, 22 n.3 (8th Cir. BAP 1997) (Neither statements of counsel nor exhibits to a brief are evidence unless expressly stipulated as admissible evidence)

because the PSA, Ex. 1, was entered in a Missoula district court case and he has no valid judgment lien on her leased land which is located outside of Missoula County. In addition Debtor argues that her leasehold interest is on Indian trust land, over which state court jurisdiction is precluded by 28 U.S.C. § 1360(b), citing *In re Wellman* (1992), 258 Mont. 131, 137-38, 852 P.2d 559, 563-64, *Krause v. Neuman* (1997), 284 Mont. 399, 406, 943 P.2d 1328, 1333 (1997), and *Smith v. McKeon (In re Smith)* (1997), 284 Mont. 528, 530-31, 946 P.2d 117, 118 (1997). For those reasons Debtor requests McVicker's claim be reclassified as unsecured and the motion for valuation be deemed moot.

McVicker's brief includes as an attachment the first page of what is represented to be a Final Decree of Dissolution showing that it was entered in Lake County on November 18, 2004, which this Court refuses[19]. McVicker distinguishes *In re Wellman* and *Smith v. McKeon* because those cases involved dissolution of marriages involving tribal members and Lisa is not a tribal member. McVicker cites *Brown v. Hart* (1985), 213 Mont. 517, 519-20, 629 P.2d 14, 15-16 for the proposition that real estate improvements on tax exempt federal land were real property subject to state taxation. Finally, McVicker cites Tribal Ordinance 40-A (Revised) of the Confederated Salish and Kootenai Tribes which he argues specifically accepted concurrent state jurisdiction over domestic relations, citing *Larrivee v. Morigeau* (1979), 184 Mont. 187, 193,

[19]That attachment is refused admission into evidence on the same grounds as the Court refused to admit Morgan's Status Report of the Debtor's surrender of her Mercedes. *In re Nielsen*, 211 B.R. at 22 n.3. The attachment is unsigned and only the first page of the purported Final Decree of Dissolution. It was not disclosed in McVicker's exhibit list filed on May 26, 2005, and was not offered at trial and exposed to objection and/or argument against its admission by the Debtor. No explanation exists in the record why the attachment, which is dated November 18, 2004, was not properly disclosed and offered at trial. This Court will not dispense with its long-standing practice and procedure governing orderly disclosure and admission of exhibits and allow the parties to engage in piecemeal post-trial submission of evidence.

602 P.2d 563, 566-67.

2. Confirmation – 11 U.S.C. § 1325.

Confirmation of Debtor's amended Plan is the most easily resolved of the instant contested matters. "For a court to confirm a plan, each of the requirements of section 1325 must be present and the debtor has the burden of proving that each element has been met." *In re Barnes*, 32 F.3d 405, 407 (9th Cir. 1995); *Chinichian v. Campolongo*, 784 F.2d 1440, 1442 (9th Cir.1986). *Id.*; *Chinichian v. Campolongo*, 784 F.2d at 1443-44 (citing cases). The Trustee and McVicker object to confirmation on several grounds, and the Debtor admitted at the hearing that her amended Plan cannot be confirmed.

Debtor's testimony established that her real estate commissions have not kept pace with her projections, and that she has quit her second job at Zimorino's. Her alleged surrender of her Mercedes, if proven at trial[20], means that the amended Plan's treatment of WFS as an unimpaired secured claim which shall receive post-petition payments outside the plan cannot be approved, and in addition the Debtor's disposable income available for plan payments must be increased to reflect the termination of car payments, maintenance, insurance and other expenses related to the Mercedes. Debtor's post-trial Status Report admits that the amended Plan cannot be confirmed due to the surrender of the Mercedes. For these reasons the Court denies confirmation of the amended Plan without further discussion and will direct the Debtor to file appropriate amendments to her Schedules and a second amended Plan in time for a final hearing on confirmation of this case which shall be set for Thursday, October 13, 2005.

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[20]Morgan is mistaken in his Status Report to suggest that a further amended plan should not require any further testimony. The surrender of Debtor's Mercedes is not a fact in evidence at present.

3. Objection to McVicker's Secured Claim & Motion for Valuation.

A. Burden of Proof.

This Court discussed the applicable law governing the burden of proof for allowance of claims in *In re Eiesland*, 19 Mont. B.R. 194, 208-09 (Bankr. D. Mont. 2001):

> A validly filed proof of claim constitutes *prima facie* evidence of the claim's validity and amount. F.R.B.P. 3001(f). The Ninth Circuit recently explained the general procedure for allocating burdens of proof and persuasion in determining whether a filed claim is allowable in *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000):
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> > A proof of claim is deemed allowed unless a party in interest objects under 11 U.S.C. § 502(a) and constitutes "*prima facie* evidence of the validity and amount of the claim" pursuant to Bankruptcy Rule 3001(f). See also Fed. R. Bankr.P. 3007. The filing of an objection to a proof of claim "creates a dispute which is a contested matter" within the meaning of Bankruptcy Rule 9014 and must be resolved after notice and opportunity for hearing upon a motion for relief. See Adv. Comm. Notes to Fed. R. Bankr.P. 9014.
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> > Upon objection, the proof of claim provides "some evidence as to its validity and amount" and is "strong enough to carry over a mere formal objection without more." *Wright v. Holm (In re Holm)*, 931 F.2d 620, 623 (9th Cir.1991) (quoting 3 L. King, Collier on Bankruptcy § 502.02, at 502-22 (15th ed.1991)); *see also Ashford v. Consolidated Pioneer Mort. (In re Consol. Pioneer Mort.)*, 178 B.R. 222, 226 (9th Cir. BAP 1995), aff'd, 91 F.3d 151, 1996 WL 393533 (9th Cir.1996). To defeat the claim, the objector must come forward with sufficient evidence and "show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves." *In re Holm*, 931 F.2d at 623.
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> * * * *
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> "If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." *In re Consol. Pioneer*, 178 B.R. at 226 (quoting *In re Allegheny Int'l, Inc.*, 954 F.2d 167, 173-74 (3d Cir.1992)). The ultimate burden of persuasion remains at all times upon the claimant. *See In re Holm*, 931 F.2d at 623.

> *See also Knize*, 210 B.R. at 778; *Matter of Missionary Baptist Foundation of America*, 818 F.2d 1135, 1143 (5th Cir.1987); *In re Stoecker*, 143 B.R. 879, 883 (N.D.Ill.1992), *aff'd in part, vacated in part*, 5 F.3d 1022 (7th Cir.), *reh'g denied* (1993).
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> Thus, the Bank's Proof of Claim No. 2 is *prima facie* evidence of the validity and amount of its claim under Rule 3001(f), and the Debtor has the burden of showing sufficient evidence and to "show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves." *Lundell*, 223 F.3d at 1039 (quoting *Holm*). This Court finds that Eric, as the objecting party, has not produced sufficient evidence to cause the burden to revert to the Bank to prove the validity and amount of its claim. *Lundell*, 223 F.3d at 1039 (quoting *In re Consol. Pioneer*, 178 B.R. at 226).

The analysis under *Lundell v. Anchor Const. Specialists* was reiterated by the Ninth Circuit in *In re Los Gatos Lodge, Inc.*, 278 F.3d 890, 894 (9th Cir. 2002). Applying this analysis to the instant case, no allegation or showing exists that McVicker's Proof of Claim No. 11 was not filed in accordance with the applicable rules. Therefore, Proof of Claim No. 11 is given *prima facie* effect of its validity and amount by Rule 3001(f), thereby placing the burden of proof upon the Debtor to come forward with sufficient evidence and "show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves". *Lundell*, 223 F.3d at 1039 (quoting *In re Holm*, 931 F.2d at 623); *Eiesland*, 18 Mont. B.R. at 209.

In support of her objection to McVicker's secured claim Debtor offers McVicker's own exhibit, the PSA Ex. 1, which shows the PSA under the caption of the Montana Fourth Judicial District Court, Missoula County, Montana, plus the uncontroverted testimony of Lisa and Leroy, and McVicker's Ex. 8, the homesite lease, all of which show that the Arlee home is located on Indian trust land. In addition, McVicker's Proof of Claim No. 11 includes as an attachment Ex. 1 showing the divorce case in Missoula County. Given the basis of McVicker's secured claim as a

judgment lien based on state law, this Court finds that the Debtor has offered sufficient evidence showing facts tending to defeat McVicker's secured claim by probative force at least equal to that of the allegations of Proof of Claim No. 11. *In re Eiesland*, 19 Mont. B.R. at 209; *Lundell*, 223 F.3d at 1039 (quoting *Holm*). This Court finds that the Debtor, as the objecting party, has produced sufficient evidence to overcome the *prima facie* effect of McVicker's Proof of Claim No. 11, and sufficient to cause the burden to revert to McVicker to prove the validity of his secured claim by a preponderance of the evidence. *In re Eiesland*, 19 Mont. B.R. at 209; *Lundell*, 223 F.3d at 1039. The Court concludes that McVicker has failed to satisfy his ultimate burden.

B. State Law Judgment Lien.

The docketing of the judgment and final decree became a judgment lien pursuant to Mont. Code Ann. § 25-9-301(2) which provides: "From the time the judgment is docketed, it becomes a lien upon all real property of the judgment debtor that is not exempt from execution *in the county* and that is either owned by the judgment debtor at the time or afterward acquired by the judgment debtor before the lien ceases. Except as provided in 61-6-123, the lien continues for 10 years unless the judgment is previously satisfied." (Emphasis added).

The evidence admitted into the record at hearing, i.e., McVicker's Ex. 1, and his Proof of Claim No. 11, all shows the PSA entered in Missoula County. In interpreting Montana's statutes, the Court does so under the "plain meaning" rule as explained by the Montana Supreme Court in *Western Energy Company v. State, Dept. of Rev.*, 297 Mont. 55, 58, 990 P.2d 767, 769 (1999):

When we interpret a statute, our objective is to implement the objectives the

> legislature sought to achieve. *Montana Wildlife Fed'n v. Sager* (1980), 190 Mont. 247, 264, 620 P.2d 1189, 1199. The legislative intent is to be ascertained, in the first instance, from the plain meaning of the words used. *Boegli v. Glacier Mountain Cheese Co.* (1989), 238 Mont. 426, 429, 777 P.2d 1303, 1305. If the intent of the legislature can be determined from the plain meaning of the words used in the statute, the plain meaning controls and the Court need go no further nor apply any other means of interpretation. *Phelps v. Hillhaven Corp.* (1988), 231 Mont. 245, 251, 752 P.2d 737, 741.

Applying the plain meaning of § 25-9-301(2), McVicker's judgment in Cause No. DR-03-98 became a lien upon all real property of Lisa "in the county", *viz.*, Missoula County. The Debtor's Arlee house located on Leroy's leased Indian trust land is not in Missoula County, and no evidence was admitted at trial which shows otherwise. The attachment to McVicker's brief was not disclosed and exchanged by McVicker before trial, is inconsistent with McVicker's Ex. 1 and McVicker's Proof of Claim, and is unsigned and incomplete. Debtor's objection to McVicker's secured claim may be sustained on this basis alone, but there are numerous additional grounds to disallow McVicker's secured claim based on state law as well as federal law.

The Debtor does not dispute that her leasehold interest is a real property interest, to which which a judgment may attach. McVicker admits that he does not claim a lien on Leroy's Indian trust land itself, but only in the Debtor's leasehold rights and improvements. The Montana Supreme Court discussed real property in *Schwend v. Schwend*, 1999 MT 194, ¶¶13-15, 295 Mont. 384, 387-388, ¶¶13-15, 983 P.2d 988, 991, ¶¶13-15:

> ¶ 13 Real Property includes: "(1) land; (2) that which is affixed to land ; (3) that which is incidental or appurtenant to land; (4) that which is immovable by law." Section 70-15-101, MCA (emphasis added).
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> ¶ 14 Personal property and equipment may become a fixture, permanently attached to the real property, pursuant to § 70-15-103, MCA, which provides:

> A thing is deemed to be affixed to land when it is:
> (1) attached to it by roots, as in the case of trees, vines, or shrubs;
> (2) imbedded in it, as in the case of walls;
> (3) permanently resting upon it, as in the case of buildings; or
> (4) permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts, or screws.
>
> ¶ 15 To determine whether an object has become a fixture or not, we consider the following factors: "(1) annexation to the realty, (2) an adaptation to the use to which the realty is devoted and (3) intent that the object become a permanent accession to the land. Of those three, the intent of the parties has the most weight and is the controlling factor." *Pacific Metal Co. v. Northwestern Bank of Helena* (1983), 205 Mont. 323, 329, 667 P.2d 958, 961 (emphasis added) (citing *Grinde v. Tindall* (1977), 172 Mont. 199, 201-02, 562 P.2d 818, 820).

In *Pacific Metal Co.* the court held that a judgment lien did not constitute a lien on a building which was subject to removal upon termination of a written lease. 205 Mont. at 327-28, 667 P.2d at 960-61. The court held that the building was intended by the parties to be and remained personal property, and therefore a judgment lien did not constitute a lien on that property. 205 Mont. at 331, 667 P.2d at 962.

In the instant case the parties' intent with respect to the improvements on the leased Indian trust land, namely the Debtor's house, are at cross purposes with the result of their stated intent under the above rule of *Pacific Metal Co.* The Debtor does not want her house removed from the leased premises and so wants it considered a fixture, which means that it is real property subject to a judgment lien. Ex. 8 provides that "any buildings or other improvements placed upon the said land by the Lessee become the property of the Lessor upon termination or expiration of the lease", except that the lessee may remove any and all buildings within 30 days after expiration or termination of the lease. Leroy, who controls access to the Arlee house across his land, is adamant that the house will not be sold or removed from his property. Debtor's

stated intent would indicate that, contrary to Debtor's wishes, the Arlee house should be considered real property permanently affixed to which a judgment lien may attach.

For his part, McVicker seeks treatment of the Arlee house and improvements as real property subject to his judgment lien, but his Ex. 6 bases its conclusions upon the removal of the house, which under *Pacific Metal Co.* would mean that his judgment lien would not constitute a lien on the house since it is subject to removal upon termination of a written lease. 205 Mont. at 327-28, 667 P.2d at 960-61. McVicker testified in his deposition, Ex. B p. 26, that he had the impression that he could remove the house if he chose at a later date. Decision on this particular issue is a very close call, in part because of Leroy's testimony that he would not allow access to anyone across his land to remove the house. Nonetheless, McVicker's evidence, Ex. 8, plainly gives Lisa a 30 day window after expiration of the lease at the end or 25 or 50 years to remove the house. For that reason the Court concludes under the holding of *Pacific Metal Co.* that McVicker's judgment would not constitute a lien on the Debtor's Arlee house since it is subject to removal upon termination of the lease. 205 Mont. at 327-28, 667 P.2d at 960-61.

The Court notes additional factors which weigh against a conclusion in support of allowing McVicker's secured claim. McVicker offered Ex. 6, A-Abel's bid, to support a showing of an $81,000 valuation of his security in the form of improvements. But Ex. 6 relies upon Leroy's permission to cross his land, and Leroy's and Lisa's testimony makes clear that no such permission will be given because of Leroy's desire to ensure a home for his grandchildren. Without access to the land to reach and remove the house, the Debtor's $0 current market value listed on amended Schedule A for her leasehold interest turns out to be, in this Court's view, accurate. For the same reason the replacement value shown by McVicker's Ex. 5 is irrelevant

because no access exists.

The rental for the lease shown by Ex. 8 is $1 for the 25 year term, and without Leroy's permission for access no conceivable market value exists for the Arlee house until the end of the lease term. McVicker's judgment lien, however, continues for only 10 years under § 25-9-301(2). Leroy and Lisa each testified that McVicker was told that he would not have any ownership interest in the house. McVicker testified in his deposition, Ex. B pp. 32-34 that he would not have an interest in the house and has never asked or spoken with Leroy about permission to remove the house. Knowing their position, McVicker took no steps to create legal protection or secured status for his contributions to construction of the house. This Court sees no reason to grant McVicker equitable relief when he took no steps on his own to protect his interest, especially when the McVicker's position seeking relief entails literally taking the roof from over his children's heads. On state law grounds governing judgment liens and real property affixed to land, the Court concludes that McVicker has failed to satisfy his ultimate burden to prove the validity of his secured claim by a preponderance of the evidence. *In re Eiesland*, 19 Mont. B.R. at 209; *Lundell*, 223 F.3d at 1039 (quoting *Holm*).

C. Indian Trust Land.

It is undisputed that the Debtor's lease involves Indian trust land. McVicker's Ex. 8 shows the homesite lease on a BIA form pursuant to federal laws and regulations. Notwithstanding, McVicker contends that state law applies because Lisa is not a tribal member, that case law holds real estate improvements on tax exempt federal land is real property subject to state taxation, and that the tribe's ordinance specifically accepted concurrent state jurisdiction over domestic relations. Leroy testified that Indian trust land such as his may not be liened by a

state court, just as no state property taxes are imposed. Federal statutes and case law support Leroy's testimony.

State civil jurisdiction over Indian trust land is restricted, and granted to certain states in actions to which Indians are parties by 28 U.S.C. § 1360, part of Pub. L. 280 which provides:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name fo the State to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State . . . .[21]
>
> (b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.
>
> (c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Washington v. Yakima Indian Nation, 439 U.S. 463, 471-73 n.9, 99 S.Ct. 740, 747-48 n. 9, 58 L.Ed.2d 740, n. 9 (1979).

Section § 1360 undermines McVicker's secured claim in each subsection. Montana is not listed among the states to which are conferred civil jurisdiction over Indian trust land under

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[21]The table lists the States of Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, with varying degrees of affected Indian country in those states. Montana is not included in § 1360.

subsection 1360(a). The Montana Supreme Court has stated: "Absent the clearest evidence of the Tribes' intent to consent to the assertion of authority by state courts onto their sovereign land, the Tribes retain their exclusive jurisdiction." *Balyeat Law, P.C. v. Pettit*, 1998 MT 252, ¶ 25, 291 Mont. 196, ¶ 25, 967 P.2d 398, ¶ 25. Thus, Montana has not assumed jurisdiction over Indian trust land under Pub. L. 280 and the Indian Civil Rights Act, and absent such an assumption of jurisdiction, civil jurisdiction *over activities of non-Indians as well as Indians on reservation lands* presumptively lies in the tribal court. *Agri West v. Koyama Farms, Inc.* (1997), 281 Mont. 167, 173, 933 P.2d 808, 812 (emphasis added); *In re Wellman*, 258 Mont. at 137, 852 P.2d at 562-63; *Fisher v. District Court* (1976), 424 U.S. 382, 96 S.Ct. 943, 47 L.Ed.2d 106.

McVicker cited no other federal statute by which Montana would have civil jurisdiction over Leroy's Indian trust land. If there were such civil jurisdiction, subsection 1360(b) specifically prohibits at the beginning the encumbrance of Indian trust land in the first sentence, and at the end prevents the exercise of jurisdiction by the State to adjudicate in the ownership or right to possession of Indian trust land "or any interest therein." McVicker cites *Brown v. Hart*, 213 Mont. at 519-20, 629 P.2d at 15-16, as support for the proposition that tax exempt federal land may be subject to state taxation. *Brown v. Hart* is inapplicable in the instant case because that case involved exempt Forest Service land, and did not construe the detailed requirements for civil jurisdiction over Indian trust land discussed above.

The third subsection 1360(c) gives full force and effect to applicable tribal ordinance or custom. McVicker's brief acknowledges the Salish-Kootenai tribal ordinance, but does not list or discuss tribal ordinances which may govern the encumbrance of Indian trust land. The evidence includes Ex. 8 which demonstrates that the Salish-Kootenai tribe has the capacity, laws

and/or procedures to record interests in Indian trust land as evidenced by date stamp on Ex. 8 showing receipt in the tribe's Title's & Records Section Branch of Realty. As the party with the ultimate burden of proof and the need for the "clearest evidence of the Tribes' intent to consent to the assertion of authority by state courts onto their sovereign land", *Balyeat Law, P.C. v. Pettit*, 1998 MT 252, ¶ 25, 291 Mont. 196, ¶ 25, 967 P.2d 398, ¶ 25, such uncertainty regarding the existence of applicable tribal law weighs against McVicker.

McVicker cites Tribal Ordinance 40-A giving the state concurrent jurisdiction over domestic relations. Tribal Ordinance 40-A is set out in *Larrivee v. Morigeau* (1979), 184 Mont. 187, 193-94, 602 P.2d 563, 566, *cert. denied* 445 U.S. 964, 100 S.Ct. 1653, 64 L.Ed.2d 240 (1980). This Court notes that the provisions of Tribal Ordinance 40-A listed in *Larrivee v. Morigeau* include a detailed list of matters in which the State has concurrent jurisdiction such as domestic relations, the operation of motor vehicles at issue in *Larrivee v. Morigeau*, and criminal laws, but notably absent from the list of matters subject to concurrent jurisdiction is the encumbrance of Indian trust land.

The disputed issue in the instant case is not whether the State had civil jurisdiction over Lisa's and McVicker's divorce, or for that matter the State's ability to tax Leroy's Indian trust land, but rather whether a state law judgment lien may encumber Indian trust land. Section 1360(b) provides that it cannot. The Court notes that the parties in the PSA distributed to Lisa the Arlee house on the Indian trust land, and McVicker was given an award of money reduced to judgment. The Montana Supreme Court has written ""[o]n its face, [§ 1360(b)] precludes state jurisdiction to adjudicate any interest in Indian trust land." *Krause v. Neuman* (1997), 284 Mont. 399, 406, 943 P.2d 1328, 1333; *In re Wellman*, 258 Mont. at 137, 852 P.2d at 563. The supreme

court in *Krause* followed the rule in *Wellman*, a divorce case where the state court correctly concluded it had no jurisdiction to adjudicate the disposition of Indian trust land. 258 Mont. at 141, 852 P.2d at 565; *see also Smith v. McKeon* (1997), 284 Mont. 528, 531, 946 P.2d 117, 118.

The above discussion of federal law, § 1360(b) and Montana Supreme Court decision regarding Indian trust land show clearly that the state court lacks jurisdiction to adjudicate the disposition of Indian trust land or authorize the encumbrance of Indian trust land. In the instant case the parties avoided, perhaps unintentionally, the jurisdictional bar by entering into a PSA. Notwithstanding their agreement § 1360(b) plainly and broadly prohibits the encumbrance of Indian trust land, which this Court deems broad enough to bar the encumbrance of Lisa's leasehold interest on Leroy's allotment by state law judicial lien.

For the above reasons, based upon state law and federal law, this Court finds and concludes that McVicker failed his ultimate burden to prove the validity of his secured claim by a preponderance of the evidence. *In re Eiesland*, 19 Mont. B.R. at 209; *Lundell*, 223 F.3d at 1039 (quoting *Holm*). Debtor's objection shall be sustained and McVicker's secured claim asserted on Proof of Claim No. 11 shall be disallowed and allowed as an unsecured, nonpriority claim. Debtor's motion for valuation of McVicker's security is moot.

4. McVicker's Motion to Dismiss for Bad Faith.

McVicker moves to dismiss with prejudice on the grounds the case is filed and is being prosecuted in bad faith. The good faith requirement of § 1325(a)(3) is a mandatory requirement. *In re Barnes*, 32 F.3d 405, 407 (9th Cir. 1995); *Chinichian v. Campolongo*, 784 F.2d 1440, 1442 (9th Cir.1986). "For a court to confirm a plan, each of the requirements of section 1325 must be present and the debtor has the burden of proving that each element has been met." *Id.*; *Chinichian*

v. Campolongo, 784 F.2d at 1443-44 (citing cases).

The Ninth Circuit has held that bad faith is "cause" for dismissal of a Chapter 13 case with prejudice under § 349(a) and § 1307(c). A dismissal with prejudice bars further bankruptcy proceedings and is a complete adjudication of the issues. *Leavitt v. Soto*, 171 F.3d 1219, 1223-24 (9th Cir.1999) (citing *In re Tomlin*, 105 F.3d 933, 936-37 (4th Cir.1997)); *In re McNichols*, 254 B.R. 422, 436 (Bankr. N.D. Ill. 2000).

In determining whether a petition or plan is filed in good faith the court must review the "totality of the circumstances". *Leavitt*, 171 F.3d at 1224-25; *In re Gress*, 257 B.R. 563, 567, 19 Mont. B.R. 30, 34 (Bankr. D. Mont. 2000); *In re Eisen*, 14 F.3d 469, 470 (9th Cir. 1994). In affirming this Court's dismissal of a Chapter 13 case with prejudice, the district court in this district has adopted the *Leavitt* "totality of the circumstances" list of factors. *In re Kreilick*, 18 Mont. B.R. 419, 421-22 (D. Mont. 2000); *In re Hungerford*, 19 Mont. B.R. 103, 130 (Bankr. Mont. 2001).

A finding of bad faith does not require fraudulent intent by the debtor. *Hungerford*, 19 Mont. B.R. at 130; *Gress*, 257 B.R. at 568:

This Court noted in *Gress*:

A finding of bad faith does not require fraudulent intent by the debtor.

> [N]either malice nor actual fraud is required to find a lack of good faith. The bankruptcy judge is not required to have evidence of debtor illwill directed at creditors, or that debtor was affirmatively attempting to violate the law-malfeasance is not a prerequisite to bad faith.

In re Powers, 135 B.R. 980, 994 (Bankr.C.D.Cal.1991) (relying on *In re Waldron*, 785 F.2d 936, 941 (11th Cir.1986)).

The determination of whether a debtor filed a petition or plan in bad faith so as to

> justify dismissal for cause is left to the sound discretion of the bankruptcy court. *In re Leavitt*, 171 F.3d at 1222-23; *In re Marsch*, 36 F.3d 825, 828 (9th Cir.1994); *Greatwood v. United States (In re Greatwood)*, 194 B.R. 637, 639 (9th Cir. BAP 1996), aff'd, 120 F.3d 268 (9th Cir.1997).
>
> The same factors govern whether Gress filed his petition or his plans in bad faith. *In re Eisen*, 14 F.3d at 470; *In re Leavitt*, 171 F.3d at 1224.

257 B.R. at 568. Thus, this Court has the discretion to dismiss this case for lack of good faith.

In *Leavitt*, 171 F.3d at 1224, the Ninth Circuit held that in determining whether a chapter 13 plan was proposed in good faith, a bankruptcy court should consider (1) whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Code, or otherwise filed his petition or plan in an inequitable manner; (2) the debtor's history of filings and dismissals; (3) whether the debtor intended to defeat state court litigation; and (4) whether egregious behavior is present. *See also, In re Cavanagh*, 250 B.R. 107, 114 (9th Cir. BAP 2000).

In addition to being grounds for denial of confirmation, bad faith is "cause" for a dismissal of a Chapter 13 case with prejudice under § 349(a) and § 1307(c), even though not specifically listed. *In re Gress*, 257 B.R. at 567; *Leavitt*, 171 F.3d at 1224; *In re Eisen*, 14 F.3d at 470 ("A Chapter 13 petition filed in bad faith may be dismissed 'for cause' pursuant to 11 U.S.C. § 1307(c)."). Upon review of the *Leavitt* factors and application of them to the evidence admitted in this case, the Court deems McVicker's motion to dismiss with prejudice for bad faith premature, given the results of Debtor's objection to McVicker's claim discussed above and subsequent possible developments. The Court will hold McVicker's motion to dismiss with prejudice in abeyance and take it up in conjunction with the final hearing on confirmation on October 13, 2005, with the following observations.

The first *Leavitt* factor is whether the debtor misrepresented facts in her petition or plan,

unfairly manipulated the Code, or otherwise filed her petition or plan in an inequitable manner. McVicker contends that the Debtor is unfairly manipulating the bankruptcy process by fraudulently omitting her Arlee home, rings and other assets and transfers from her Schedules and Statement of Financial Affairs, understating her income and overstating her business expenses, and falsely testifying that the Avalanche and Waverunner are for the benefit of her mother in a scheme to retain the use of luxury assets.

The Debtor amended her Schedules to list the house and other assets, explained that certain assets were hidden to prevent theft by McVicker or gifted to her children. Liberal amendment of schedules is allowed as a matter of course at any time before a case is closed under Rule 1009(a). *In re Michael*, 17 Mont. B.R. 192, 198 (9th Cir. 1998) (citing cases). However, amendment may be denied on a showing of a debtor's bad faith. *Id.*; *In re Magallanes*, 96 B.R. 253, 255-56 (9th Cir. BAP 1988). On this factor, McVicker's motion to dismiss is simply premature.

The Debtor failed to list the Arlee house, but because of terms of the homesite lease and Leroy's ability to prevent sale or access to the property the value she placed on the leasehold of $0 is not evidence of bad faith. Lisa testified that her real estate commission income has not met her projections. It cannot be disputed that real estate commission income is subject to variance for a variety of reasons. Debtor's expenses were listed and amended, and the Debtor freely admitted that when she does not earn her commission income she does not spend money on projected expenditures. Such circumstances of belt tightening do not evidence bad faith.

The evidence at trial is uncontroverted that Debtor's parents contribute $1,200 to help with living expense and her Chapter 13 Plan. In addition her mother makes the payment for both

the Avalanche and the Waverunner, and allows the Debtor to use those assets. No objection exists to Debtors' parents contributions to her income. McVicker argued at trial that Lisa's parents' contributions could be used to pay for other things, but no requirement exists that family contributions be specifically earmarked, and the evidence shows that the Debtor uses the Avalanche primarily, and the Waverunner exclusively, in her employment.

The second *Leavitt* factor is the debtor's history of filings and dismissals. No evidence exists of any prior filings by Lisa, and thus the second *Leavitt* factor weighs squarely against a finding of bad faith.

The third *Leavitt* factor is whether the debtor intended to defeat state court litigation. The Debtor listed McVicker's claim in her Schedules, and while she objected to his secured claim her objection was successful and she admits his claim should be allowed as an unsecured nonpriority claim in the amount filed. The evidence in the record shows that she decided to file for bankruptcy protection because her commission income dropped and McVicker was paying nothing in child support. That evidence is uncontroverted. The third *Leavitt* factor weighs against a finding of bad faith.

The final *Leavitt* factor is whether egregious behavior is present. Decision on this factor is premature, and will be decided after the final hearing on confirmation. The Debtor retained the use of the Mercedes from March 2005 almost through the month of August, spending almost $560 per month which could have gone to plan payments while retaining the use of another new vehicle paid for by her parents. Now the Debtor has allegedly surrendered the Mercedes and seeks to amend her Schedules and Plan again. In its discretion the Court declines to rule on McVicker's motion to dismiss at present. This matter will be heard for the final time on October

13, 2005, and decided shortly thereafter.

CONCLUSIONS OF LAW

1. By admission, Debtor failed her burden of satisfying the requirements of 11 U.S.C. § 1325(a) for confirmation of her amended Chapter 13 Plan. Subsequent admission by Debtor's Status Report reinforces the Court's conclusion the Chapter 13 Plan fails to satisfy the "disposable income" test of § 1325(b)(2).

2. Debtor satisfied her initial burden under *Lundell v. Anchor Const. Specialists, Inc.*, 223 F.3d 1035, 1039 (9th Cir. 2000) by sufficient evidence showing facts tending to defeat McVicker's secured claim by probative force at least equal to that of the allegations of Proof of Claim No. 11. *In re Eiesland*, 19 Mont. B.R. at 209. Debtor produced sufficient evidence to overcome the *prima facie* effect of McVicker's Proof of Claim No. 11, and sufficient to cause the burden to revert to McVicker to prove the validity of his secured claim by a preponderance of the evidence. *Id.*; *Lundell*, 223 F.3d at 1039. McVicker has failed to satisfy his ultimate burden. *In re Holm*, 931 F.2d at 623.

3. McVicker failed to show by a preponderance of the evidence admitted at trial that his judgment was docketed in Lake County, Montana, as required for a judgment lien pursuant to Mont. Code Ann. § 25-9-301(2). McVicker's proferred attachment to his post-hearing brief is refused.

4. Under the holding of *Pacific Metal Co.,* 205 Mont. at 327-28, 667 P.2d at 960-61, McVicker's judgment would not constitute a lien on the Debtor's Arlee house since the house is subject to removal upon termination of the lease.

5. 28 U.S.C § 1360(b) precludes state jurisdiction to adjudicate any interest in Indian

trust land. *Krause v. Neuman*, 284 Mont. at 406, 943 P.2d at 1333; *In re Wellman*, 258 Mont. at 137, 852 P.2d at 563. Thus, the state court through Mont. Code Ann. § 25-9-301(2) lacked jurisdiction to encumber the Debtor's leasehold interest in Indian trust land.

6. McVicker failed to make an adequate showing of bad faith by the Debtor to warrant dismissal of this case with prejudice, at this time. The Court holds McVicker's motion in abeyance pending the final hearing on confirmation.

IT IS ORDERED a separate Order shall be entered in conformity with the above: (1) denying confirmation of the Debtor's amended Chapter 13 Plan, filed May 23, 2005, and granting the Debtor 10 days to file a further amended Plan and Schedules, or this case will be dismissed without further notice or hearing for lack of diligent prosecution; (2) sustaining the Debtor's objection to McVicker's secured claim, filed May 26, 2005, disallowing McVicker's secured claim set forth on Proof of Claim No. 11 and allowing McVicker's claim as an unsecured, nonpriority claim; (3) denying Debtor's motion for valuation of McVicker's security, filed May 26, 2005, on grounds of mootness; (4) holding McVicker's motion to dismiss with prejudice in abeyance pending a final hearing; and (5) setting the final hearing to be held in this case on confirmation of Debtor's second amended Plan for Thursday, October 13, 2005, at Missoula.

BY THE COURT

Ralph B. Kirscher

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana